trict court that the relevant market consisted of "total sales of artificial teeth to the laboratories and the dealers combined" and that petitioner's longstanding, "predominant" market share is "more than adequate to establish a prima facie case" of monopoly power. *Id.* at 9a-10a; see *id.* at 140a (CL 23). The court of appeals rejected, however, the district court's determination that petitioner lacked the power to exclude rivals. *Id.* at 10a-14a. It found clearly erroneous the district court's finding that direct distribution to laboratories provided rival manufacturers with a "viable" distribution alternative to the dealer channel. *Id.* at 18a. The court of appeals observed that direct distribution "is 'viable' only in the sense that it is 'possible,' not that it is practical or feasible in the market as it exists and functions." *Ibid.* Under Section 2 monopoly maintenance law, the "mere existence of other avenues of distribution is insufficient without an assessment of their overall significance to the market." *Id.* at 23a-24a.

The court of appeals concluded that "realities of the marketplace" demonstrate in this case that it is "impracticable for a manufacturer to rely on direct distribution to the laboratories in any significant amount." Pet. App. 16a, 18a-19a. Rather, "the firm that ties up the key dealers rules the market," *id.* at 13a, and petitioner's "grip on its 23 authorized dealers effectively choked off the market for artificial teeth, leaving only a small sliver for competitors," *id.* at 24a-25a. Hence, rivals employing direct distribution could "stay in business," but cannot "pose[] a real threat" to petitioner. *Id.* at 18a-19a (quoting *United States* v. *Microsoft Corp.*, 253 F.3d 34, 71 (D.C. Cir.) (en banc) (per curiam), cert. denied, 534 U.S. 952 (2001)). The court of appeals accordingly concluded that the "evidence demonstrated conclusively

that Dentsply had supremacy over the dealer network and it was at that crucial point in the distribution chain that monopoly power over the market for artificial teeth was established." *Id.* at 13a. See *id.* at 14a-15a.

The court of appeals further concluded that petitioner's "blocking of access to the key dealers," and not rivals' "apparent lack of aggressiveness," was responsible for the rivals' "paltry results." Pet. App. 11a. The court determined that the evidence established beyond question that petitioner's exclusionary conduct had "a significant effect in preserving [petitioner's] monopoly" and was a "solid pillar of harm to competition." *Id.* at 15a. It stated that the district court's theory that rival manufacturers could "steal" a dealer away from petitioner "simply has not proved to be realistic." *Id.* at 21a; see *id.* at 25a. Rather, petitioner's "all-or-nothing" policy with dealers created "a strong economic incentive for dealers to reject competing lines in favor of [petitioner's] teeth," despite the dealers' at-will relationship with petitioner. *Id.* at 19a, 22a, 23a. See *id.* at 20a-21a. The court of appeals agreed with the district court that petitioner's proffered justifications were "pretextual and did not excuse its exclusionary practices." *Id.* at 25a.

Finally, the court of appeals rejected as a matter of law the district court's conclusion that a determination that petitioner was not liable under the government's exclusive dealing claims under Section 1 of the Sherman Act and Section 3 of the Clayton Act required a determination that petitioner was not liable under the government's monopoly maintenance claim under Section 2 of the Sherman Act. Pet. App. 25a-26a. It also rejected petitioner's corollary argument that the government was precluded from appealing the Section 2 judgment because it had not also appealed the adverse judgments

under Section 1 or Section 3. See *id.* at 26a. The court of appeals remanded "with directions to grant the Government's request for injunctive relief," *id.* at 1a, and later denied rehearing and rehearing en banc, *id.* at 146a-147a. Petitioner did not seek a stay of the court of appeals' mandate. See Fed. R. App. P. 41(d)(2).

b. After the court of appeals' mandate issued, the parties made unsuccessful efforts to negotiate a final judgment specifying the appropriate terms of relief. On September 28, 2005, the district court denied the government's motion for entry of its proposed final judgment, pending disposition of this petition. The district court referred the matter to a magistrate judge to assist the parties in negotiating the terms of a final judgment. If those efforts prove unsuccessful, the parties would proceed to litigate the remedy.

ARGUMENT

Petitioner's request for a writ of certiorari should be denied. As a threshold matter, petitioner seeks interlocutory review before entry of a final judgment specifying the remedy, contrary to this Court's policy against piecemeal review. More fundamentally, the court of appeals' decision properly applies settled law to this monopoly maintenance claim and does not conflict with any decision of this Court or any court of appeals.

1. Petitioner seeks immediate review of an interlocutory decision that has resolved only petitioner's liability and not the appropriate terms of relief. The court of appeals' decision reversed the district court's final judgment in favor of petitioner and remanded "with directions to grant the Government's request for injunctive relief." Pet. App. 1a. The parties unsuccessfully attempted to negotiate a joint proposed final judgment,

and the district court has now referred the matter to a magistrate judge to assist the parties in reaching a negotiated decree. Hence, the Court does not have before it a final judgment in this case.

The interlocutory character of the case "of itself alone furnishe[s] sufficient ground for the denial" of petitioner's request for this Court's review. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); see also *ibid.* ("except in extraordinary cases, the writ is not issued until final decree"); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of petition for certiorari) ("[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258-261 (8th ed. 2002).

2. Petitioner's challenges to the court of appeals' application of Section 2 monopoly maintenance law are unpersuasive. The court enunciated well-settled legal standards: "A violation of Section 2 consists of two elements: (1) possession of monopoly power and (2) '. . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" Pet. App. 6a (quoting *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992)). Petitioner challenges neither the court of appeals' determination that petitioner possesses monopoly power, *id.* at 10a-15a, nor the court's affirmance of the district court's finding that peti-

tioner's proffered procompetitive justifications were "merely pretextual," *id.* at 25a, 143a (CL 37).[4]

a. Petitioner argues that the court of appeals "did not properly consider all existing or potential alternative channels of distribution" (Pet. 13) in determining that petitioner's exclusionary conduct had "a significant effect in preserving [petitioner's] monopoly," Pet. App. 15a. That argument, which amounts to merely a disagreement over the court of appeals' assessment of the facts, plainly does not warrant this Court's review.

In any event, the court of appeals carefully considered the various distribution alternatives to petitioner's dealer channel, and the court determined that it was clear that petitioner's "grip on its 23 authorized dealers effectively choked off the market for artificial teeth." Pet. App. 24a. The court explained that the independent dealers that petitioner used were the "key" dealers, "provid[ing] a critical link to end-users," *id.* at 15a, 24a, and that "the firm that ties up the key dealers rules the market," *id.* at 13a. Indeed, the district court had found that petitioner sought to deny its rivals access to those dealers precisely because petitioner recognized that those dealers were "key." See *id.* at 81a (FF 216), 84a (FF 221(e)).

The court of appeals also confirmed the district court's findings that petitioner wooed dealers once those

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[4] Petitioner's claim that the court of appeals erroneously changed the market definition and thereby improperly "double count[ed]" sales to dealers (Pet. 12-13 & n.5) cannot be reconciled with the court's clear statement that "the *District Court understood, as do we*, the relevant market to be the total sales of artificial teeth to the laboratories and the dealers combined." Pet. App. 9a (emphasis added). Far from "double counting," Pet. 13 n.5, the court of appeals ensured that every tooth sale was counted just once. See Pet. App. 2a-3a, 9a.

dealers were poised to help rivals improve their competitive positions and that petitioner authorized dealers it had previously rejected or terminated in order to deny them to rivals. See Pet. App. 12a-13a, 22a, 71a-72a (FF 183-185), 82a-84a (FF 220-223). The court of appeals did not "completely ignore[]" the availability of non-Dentsply dealers, Pet. 13, but rather held that those dealers were competitively insignificant. Petitioner cites the sheer number of remaining distributors without addressing their relative capabilities. Pet. 14, 16. As the court of appeals emphasized, however, there is a wide disparity in "comparative size" between Dentsply's dealers and the others, contrasting as an example Dillon Co., a non-Dentsply dealer, with Zahn and Patterson, two of petitioner's largest dealers. See Pet. App. 22a (quoting Dillion's president: "Zahn does $2 billion, I do a million-seven. Patterson does over a billion dollars, I do a million-seven. I have ten employees, they have 6,000.").[5]

b. Contrary to petitioner's contentions (Pet. 14), the court of appeals properly considered the potential *effectiveness* of alternative forms of distribution, invoking the principle that a monopolist may not shut competitors out of a major channel of distribution unless there are distribution alternatives that permit a rival "to pose a

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[5] The court of appeals also properly rejected petitioner's argument (Pet. 16) that rivals could "steal" dealers away from petitioner. Such "purloining efforts have been thwarted by [petitioner's] longtime, vigorous and successful enforcement actions." Pet. App. 21a. Petitioner "imposes an 'all-or-nothing' choice on the dealers. The fact that dealers have chosen not to drop [petitioner's] teeth in favor of a rival's brand demonstrates that they have acceded to heavy economic pressure." *Id.* at 23a. See *id.* at 12a-13a, 21a-22a (describing pressure petitioner brought to bear on dealers).

real threat to [defendant's] monopoly." *Microsoft*, 253 F.3d at 71; Pet. App. 19a. See *Conwood Co., L.P.* v. *United States Tobacco Co.*, 290 F.3d 768, 787-788 (6th Cir. 2002) (defendant maintained monopoly through conduct aimed at the best channel of distribution), cert. denied, 537 U.S. 1148 (2003). The court of appeals determined that direct distribution does not pose such a threat, expressly rejecting as clearly erroneous the district court's finding that direct distribution to laboratories was a "viable" alternative to the dealer channel. Pet. App. 18a-19a. See *id.* at 16a (the "record is replete with evidence of benefits provided by dealers" to laboratories), 16a-18a (describing benefits of dealers), 24a (petitioner's dealers "provide a critical link to end-users").[6]

Petitioner argues that the mere existence of alternative distribution channels precludes liability as a

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[6] See also Pet. App. 13a (dealer network used by petitioner was the "crucial point" in distribution); *id.* at 18a (direct distribution is not "practical or feasible in the market as it exists and functions"); *id.* at 21a ("[t]he paltry penetration in the market by competitors over the years has been a refutation of theory by tangible and measurable results in the real world"); *id.* at 15a ("[b]y ensuring that the key dealers offer [petitioner's] teeth either as the only or dominant choice, Dealer Criterion 6 has a significant effect in preserving [petitioner's] monopoly"); *id.* at 11a ("[i]t has not been so much the competitors' less than enthusiastic efforts at competition that produced paltry results, as it is the blocking of access to the key dealers"). Petitioner mistakenly characterizes the decision below as holding that petitioner's rivals posed no threat merely because of their small market shares. Pet. 8, 15, 17. Rather, the court of appeals held, correctly, that the *direct distribution channel* does not allow any rival in this market to "pose a real threat" to petitioner's monopoly. Pet. App. 19a. The court of appeals' acknowledgment that petitioner's rivals were able to "survive" by employing direct distribution, *ibid.*, does not undermine the conclusion that petitioner violated Section 2 because even a monopolist faces competitive constraints. See, *e.g.*, *Microsoft*, 253 F.3d at 70-71.

matter of law and that the court of appeals erred by engaging in a "comparative analysis" of the "relative ineffectiveness of selling directly." Pet. 14-15. Cf. Pet. App. 23a-24a. The law of monopoly maintenance, however, is otherwise. See *Microsoft*, 253 F.3d at 70-71; see also *Conwood*, 290 F.3d at 787-788.[7]

c. Contrary to petitioner's assertion, the court of appeals did not express the view, or even suggest, that it is "*per se* unlawful" for all "firms with sizeable market shares" to employ exclusive dealing. Pet. 17. Rather, after reviewing the record as a whole in light of the proper legal standard under Section 2, the court of appeals determined that petitioner—a monopolist—kept rivals out of the dealer channel and thereby preserved its monopoly. See, *e.g.*, Pet. App. 13a, 15a. Although, as petitioner observes (Pet. 16), exclusive dealing contracts *may* be pro-competitive, both courts below found that petitioner's proffered justifications were "merely pretextual" and that the "express" and "sole purpose" of Dealer Criterion 6 was to exclude competition. Pet. App. 25a, 81a (FF 216-217), 143a (CL 37). Nothing in the court of appeals' fact-intensive decision suggests that it was announcing a per se rule respecting exclusive dealing.

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[7] Petitioner mistakenly relies on debatable characterizations of lower court decisions addressing Section 3 of the Clayton Act, rather than on decisions addressing monopoly maintenance. See Pet. 14-15. Petitioner also relies on *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415-416 (2004) (Pet. 15), but that reliance is misplaced. *Trinko* involved the application of Section 2 to the conduct of a monopolist, but the alleged violation was the monopolist's refusal to share its *own* facilities with its rivals. By contrast, petitioner's violation centered on its preventing independent dealers from sharing *their* assets with petitioner's rivals.

3. Petitioner argues that the court of appeals' decision conflicts with *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961), and six other court of appeals decisions. See Pet. 9-12. Petitioner overlooks a critical distinction: None of those cases purported to address Section 2 monopoly maintenance—the only claim at issue in the court of appeals in this case. Instead, those supposedly conflicting decisions all focused on exclusive dealing claims arising under Section 1 of the Sherman Act and Section 3 of the Clayton Act. Here, the court of appeals determined, under Section 2, that the anticompetitive effects of petitioner's threats and its use of its monopoly power excluded rivals "*despite* the lack of long term contracts between the manufacturer and its dealers." Pet. App. 1a (emphasis added); see *id.* at 12a-13a, 19a-25a.

a. Monopoly maintenance under Section 2 of the Sherman Act has its own elements and standards. See, *e.g.*, *LePage's*, 324 F.3d at 157 n.10; *Microsoft*, 253 F.3d at 70; *U.S. Healthcare, Inc.* v. *Healthsource, Inc.*, 986 F.2d 589, 593, 597-598 (1st Cir. 1993). Unlike claims under Section 1 of the Sherman Act and Section 3 of the Clayton Act, which generally require proof that the defendant possesses market power, Section 2 claims require proof of *monopoly* power, which is "of course, something greater than market power under § 1." *Eastman Kodak*, 504 U.S. at 481.

Section 2 reflects the fundamental principle that the conduct of a monopolist is "examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist." *Eastman Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) (citing 3 Philip Areeda

& Donald F. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 813, at 300-302 (1978)). See also *Microsoft*, 253 F.3d at 70 ("a monopolist's use of exclusive contracts" may violate Section 2 even if it does not violate Section 1); *LePage's*, 324 F.3d at 157 n.10 (adverse jury finding on plaintiff's "exclusive dealing claim under § 1 of the Sherman Act and § 3 of the Clayton Act does not preclude the application of evidence of [defendant's] exclusive dealing to support [plaintiff's] § 2 claim").

b. Petitioner mistakenly suggests (Pet. 17) that the government was not entitled to pursue its appeal of the district court's erroneous rejection of the Section 2 claim without also appealing the district court's rejection of the government's claims under Section 1 of the Sherman Act or Section 3 of the Clayton Act. The government—not petitioner—is entitled to choose the grounds for a government appeal. To be sure, the district court's holdings respecting Section 1 and Section 3 reflected some of the same erroneous factual findings that the court of appeals ultimately rejected in considering the government's appeal from the Section 2 ruling. See, *e.g.*, Pet. App. 18a-19a (district court's finding of "viability" of direct distribution was clearly erroneous). As the court of appeals correctly observed, however, a judgment that petitioner unlawfully maintained its monopoly in violation of Section 2 of the Sherman Act would allow the government to obtain all of the relief that it seeks in this case. *Id.* at 26a. The government accordingly had no need to seek review of the Section 1 and Section 3 claims, and the court of appeals had no occasion to consider whether the district court erred with respect to those claims.

c. Petitioner also argues (Pet. 17-18) that this Court's decision in *Tampa Electric*, *supra*, precluded the court of appeals from finding Section 2 liability in the absence of Section 3 liability. Petitioner relies on the Court's observation in *Tampa Electric* that:

> We need not discuss the respondents' further contention that the contract also violates §1 and §2 of the Sherman Act, for if it does not fall within the broader proscriptions of §3 of the Clayton Act it follows that it is not forbidden by those of the former.

365 U.S. at 335. See Pet. 17 n.7, 18. That statement, which petitioner abstracts without reference to its context, has no bearing on the situation presented here, which involves anticompetitive conduct by a longstanding monopolist.

The Court concluded in *Tampa Electric* that a utility's requirements contract for coal did not violate Section 3 because it did not "tend to foreclose a substantial volume of competition." 365 U.S. at 335. The Court accordingly concluded that the contract could not provide a basis for antitrust liability under any of the three claims before it, none of which involved monopoly maintenance. See Resp. Br. at 61-62 & Reply Br. at 26-27, *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) (No. 87) (raising issue of unlawful acquisition of monopoly, but not monopoly maintenance).[8] By contrast, the court of appeals in this case reviewed *only* the government's Section 2 claim. The court of appeals de-

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[8] The requirements contract committed the utility to buy less than 1% of the coal available in the relevant market. See *Tampa Elec.*, 365 U.S. at 321, 333, 335. It was obvious that the contract could not create a monopoly in violation of Section 2, and the Court's decision, not surprisingly, contains no discussion of monopoly maintenance.

termined that the government had demonstrated that a monopolist, lacking any nonexclusionary justification, engaged in conduct for the purpose and with the effect of foreclosing competition to maintain its monopoly power. The court of appeals was entitled to make that ruling based on the record before it and, for the reasons discussed above (see p. 16, *supra*), did not address the question whether petitioner also violated Section 1 or Section 3. See Pet. App. 25a-26a.

d. The decisions of other courts of appeals that petitioner cites are similarly off point. Those cases all involve the resolution of fact-intensive challenges to exclusive dealing under Section 1 of the Sherman Act or Section 3 of the Clayton Act. None of them involves the application of the established standards governing Section 2 monopoly maintenance claims.

In *CDC Technologies, Inc.* v. *IDEXX Laboratories, Inc.*, 186 F.3d 74 (2d Cir. 1999) (Pet. 11-12), the court rejected a Section 1 claim because all competitors sold directly, the "distributors" provided only sales leads, and the restraint did not prevent the plaintiff from "achiev[ing] distributor coverage almost nationwide" and increasing its sales. 186 F.3d at 76, 80-81. In *Omega Environmental, Inc.* v. *Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), cert. denied, 525 U.S. 812 (1998) (Pet. 11), the court determined that there was no violation of Section 3 when all of the competitors sold both directly and through dealers, the restraint did not prevent another competitor from putting together a network of over 100 dealers, and the market was characterized by "increasing output, decreasing prices, and significantly fluctuating market shares." 127 F.3d at 1164; see *id.* at 1162-1165. And in *Healthsource* (Pet. 10), the court rejected claims under Section 1 because the plain-

tiff failed to demonstrate that an HMO's optional exclusivity with independent doctors had an effect on competition. *Healthsource*, 986 F.2d at 595-597. The court also rejected the plaintiff's claim under Section 2 of the Sherman Act for failure to prove a "properly defined product market" within which the defendant "could approach monopoly size." *Id.* at 599; see *id.* at 597-599.

In *Seagood Trading Corp.* v. *Jerrico, Inc.*, 924 F.2d 1555 (11th Cir. 1991) (Pet. 12), the court of appeals rejected a Section 1 claim of exclusive dealing because the exclusive relationship foreclosed only "one provider in the enormous market for restaurant delivery services." 924 F.2d at 1572-1573. In *Ryko Manufacturing Co.* v. *Eden Services*, 823 F.2d 1215 (8th Cir. 1987), cert. denied, 484 U.S. 1026 (1988) (Pet. 12), the court rejected a distributor's claim under Section 1 and Section 3 because the distributor was precluded merely from selling its own product in competition with the distributed product, and there was "no evidence suggesting" that the exclusive dealing provisions prevented defendant's "competitors from finding effective distributors for (or other means of promoting and selling) their products." 823 F.2d at 1234; see *id.* at 1233-1235.

In *Roland Machinery Co.* v. *Dresser Industries, Inc.*, 749 F.2d 380 (7th Cir. 1984) (Pet. 12), the court reversed a preliminary injunction under Section 3 because of plaintiff's failure to show "a substantial anticompetitive effect, actual or potential," and defendant demonstrated a plausible procompetitive justification for its action. 749 F.2d at 394; see *id.* at 395. See also *Roy B. Taylor Sales, Inc.* v. *Hollymatic Corp.*, 28 F.3d 1379, 1385 (5th Cir. 1994), cert. denied, 513 U.S. 1103 (1995) (Pet. 15) (rejecting Section 1 tying claim by

distributor because it complained only of lost profits, not reduced competition).

Those Section 1 and Section 3 rulings share only one relevant attribute with the court of appeals' decision in this Section 2 case: They all turned on fact-intensive inquiries respecting the characteristics of the relevant market and the defendant's conduct. They announce no categorical rule that would be inconsistent with the result reached below, and they provide no reason to doubt that the court of appeals properly applied settled Section 2 monopoly maintenance principles to petitioner's conduct. Further review of this case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005

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No. 05-337

In the Supreme Court of the United States

DENTSPLY INTERNATIONAL INC.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ARGUMENT

I. The Government's Position That Dentsply's Petition For Writ Of Certiorari Is Premature Is Erroneous

The Government maintains that, because the parties are negotiating the terms of a joint final judgment in the district court, this petition for certiorari is "interlocutory," and thus "the Court does not have before it a final judgment in this case" that merits the Court's review. Opp. at 10. Yet, the very authority said to be supportive explains that the "interlocutory" rule has application principally when resolution of the issues on remand bear on the merits of the underlying litigation and could alter the need for review itself. Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258-61 (8th ed. 2002), and cases cited therein.[1] That is decidedly not the case here. The Third Court remanded "with directions to grant the Government's request for injunctive relief." Opp. at 9. Its return of the case to the lower court allowed for no reconsideration of any substantive issue decided on the merits. The trial judge stayed the Government's request for entry of injunctive relief pending this Court's consideration of Dentsply's Petition. Reply App. 1a (denying "without prejudice to renew once the Supreme Court has rendered its final decision"). Clearly, if this Court agrees that the case is certworthy and should ultimately determine that the trial court, not the appeals court, ruled correctly, there would be no occasion for entry of an injunction. If this Court should decide otherwise, the injunction will undoubtedly issue. A

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[1] The Government cites to one case, *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), involving this Court's denial of certiorari where the circuit court had remanded with instructions to determine the appropriate remedy. Opp. at 10. But in *VMI*, unlike here, the remedy was central to the question that the Petitioner was asking this Court to review.

dismantling of Dentsply's entire distribution network, however, if necessary, should occur only after this Court has had an opportunity to decide its validity, not before.

This is particularly the case where, as Mr. Stern notes in that part of his discussion omitted by the Government, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." *Supreme Court Practice* § 4.18, at 259. Then, "the case may be reviewed despite its interlocutory status—particularly if the lower court's decision is patently incorrect and the interlocutory decision, such as a preliminary injunction, will have immediate consequences for the petitioner." *Id.* The present Petition brings just such an issue to this Court, and, for the reasons stated in the Petition and hereafter discussed, it is fully deserving of immediate plenary review.

II. The Third Circuit's Decision On An Important Question Of Antitrust Law Is In Conflict With *Tampa Electric* And At Least Six Other Circuit Court Decisions

The issue here is whether, in the absence of market foreclosure or any actual or probable competitive harm to rivals, use of exclusive dealerships by the dominant firm in the market violates Section 2 of the Sherman Act. The First, Second, Seventh, Eighth, Ninth and Eleventh Circuit Courts of Appeals have all held that such arrangements are not anticompetitive under the antitrust laws—specifically under either Sherman § 1 or Clayton § 3—where rivals have alternative access to the end-user market, either directly or through other available distribution channels. *See, e.g., U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589 (1st Cir. 1993); *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74 (2d Cir. 1999); *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380 (7th Cir. 1984); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d

1215 (8th Cir. 1987); *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997); *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555 (11th Cir. 1991). These decisions followed the reasoned approach of this Court in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), which held that the essential antitrust inquiry when examining exclusive dealing arrangements is whether those arrangements "foreclose competition in a substantial share of the line of commerce effected." 365 U.S. at 327.

Moreover, the Second, Fourth, Eighth and Ninth Circuits, again following *Tampa Electric*, 365 U.S. at 335, held that, upon determining that exclusive dealerships present *no probability* of anticompetive effects (the Clayton § 3 antitrust inquiry), it follows that they do not violate the Sherman Act's monopolization section (Sherman § 2), which looks not just to probabilities, but to actuality. *See CDC Techs.*, 186 F.3d at 79; *Amplex of Md., Inc. v. Outboard Marine Corp.*, 380 F.2d 112, 116 (4th Cir. 1967); *Ryko Mfg.*, 823 F.2d at 1233 n.16; *Gilbarco*, 127 F.3d at 1167 n.13.

The Third Circuit clearly parts company with this precedent and charts its own disturbing course, which leads to its conflicting holding below that exclusive dealerships, if used by the dominant competitor in the market, are unlawful under Sherman § 2 if (without more) the arrangements are effective and are being utilized for competitive purposes. It matters not to the Third Circuit that the relevant end-user market remains open and available to Dentsply's rivals,[2] nor that those rivals face *no*

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[2] There is no dispute that Dentsply's rivals can and do reach the end-user market with their artificial tooth products by direct distribution to the labs. Pet. App. 4a. It is also undisputed that these rivals have "hundreds" of other distribution channels available to them; indeed, some of the rivals have their own network of distributors (in addition to using direct delivery on occasion). Pet. App. 3a. The trial court so found, and the Third Circuit accepted those findings. Pet. App. 2a, 3a, 31a-37a, 60a.

probability of anticompetitive effects from Dealer Criterion 6 policy.[3] This pushes Sherman § 2 analysis of exclusive dealerships to the brink of a *per se* approach, if not over the edge. It squarely contradicts *Tampa Electric*, and cannot be reconciled with the above Circuit Court decisions.

The Government argues that this sharp divergence from prior precedent is not a serious matter because Sherman § 2 differs from Sherman § 1 and Clayton § 3, and looks at exclusive arrangements more harshly in the hands of a monopolist than do the other antitrust provisions when examining such arrangements in the hands of lesser market participants. Opp. at 15. Restating the issue presented more to its liking—*i.e.*, both market foreclosure and competitive harm are removed from the inquiry—the Government thus proceeds to defend the Third Circuit's Sherman § 2 analysis as properly inquiring only into the effectiveness of Dentsply's Criterion 6 distributors and whether Dentsply's use of them was for competitive purposes.

There is, however, no dispute that the Criterion 6 dealers used by Dentsply operated effectively, or that Dentsply consequently discouraged them from serving its other competitors. As found below, both in the trial court and on appeal, Dentsply always sold its teeth exclusively through dealers. Pet. App. 16a. Certain of its 23 dealers were high-volume sellers, and, as such, provided benefits to Dentsply that, in that sense, certainly made its distribution network competitively effective. Pet. App. 4a, 16a-17a. Hence, Dealer Criterion 6, unsurprisingly, remained a longstanding company policy, and, while Dentsply's rivals were free to approach and try to lure away any of its 23

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[3] The Clayton § 3 ruling of the trial court—*i.e.*, that the Government failed to show probable anticompetitive effects from Dealer Criterion 6 (Pet. App. 137a)—was not appealed and remains unchallenged by the Government. Pet. App. 5a.

dealers, Dentsply made clear that any dealer who elects to carry a competitive line of teeth will no longer be permitted to carry Dentsply's tooth products. Pet. App. 3a.

The Third Circuit and the Government maintain that this "unavailability" to Dentsply's rivals of the Criterion 6 dealers removed all likelihood that those rivals would "pose a real threat" to Dentsply's commanding market position, citing *United States v. Microsoft Corp.*, 253 F.3d 34, 71 (D.C. Cir 2001). *See* Opp. at 12-13; *see also* Pet. App. 15a. But, *Microsoft*, far from supporting the decision below, demonstrates what is terribly wrong with the Third Circuit's Sherman § 2 analysis, and why it compels this Court's plenary review. As the D.C. Circuit makes clear, finding that Microsoft's rivals "pose no real threat" to its market position is merely the threshold inquiry under Sherman § 2. 253 F.3d at 71. To determine liability, it was necessary to further ascertain whether the exclusive arrangements with the dominant firm, as effective as they were recognized to be, did or did not foreclose access by Microsoft's rivals to the relevant end-user market. Asking and answering that essential question—which is no different for Sherman § 2 than for Sherman § 1 or Clayton § 3—the *Microsoft* court, interestingly, found (i) that market foreclosure resulted from Microsoft's exclusive dealing arrangements with Internet Access Providers regarding Microsoft's browser product (Internet Explorer) and was the reason why rivals of Microsoft's operating systems did not and could not "pose a real threat" in the Operating Systems market, but (ii) that the same exclusive contracts did not foreclose rivals of Internet Explorer (again, in no position to "pose a real threat") from entering the Browser market and thus, despite their obvious effectiveness, were no cause for antitrust condemnation. *Id.* at 71, 80-83.

It is thus clearly not the case, as the Government argues, that because the exclusive dealing issue is presented

here under Sherman § 2, the contrary Circuit Court decisions discussed in the Petition can be wholly disregarded. *Microsoft*, like the present case, involved a monopoly maintenance claim, and, after determining that its rivals "posed no real threat" to Microsoft's dominant position, the D.C. Circuit engaged in the same "market foreclosure" inquiry to assess whether the exclusive arrangements there caused competitive harm as did the First, Second, Seventh, Eighth, Ninth and Eleventh Circuits under Sherman § 1 and Clayton § 3. *See Microsoft*, 253 F.3d at 69 ("[I]n all [exclusive dealing] cases, the plaintiff must . . . prove the degree of foreclosure."). Each of these other appellate courts determined, contrary to the Third Circuit, that where alternatives were available to rivals enabling them to readily reach the relevant end-user market, either directly or indirectly (or both), there can be no finding of anticompetitive effects, whether dealing in probabilities (Clayton § 3) or actuality (Sherman §§ 1 and 2). Petition at 10-12.

In this connection, the circumstances of the *Gilbarco* case in the Ninth Circuit were very much the same as here. There, the panel held that the percentage of defendant's sales sold through its distributors "'considerably overstates the size of the foreclosure and its likely anticompetitive effects'" because there were "existing" and "potential" alternative channels of distribution, including direct sales and distributors in related businesses, that must be considered. *Gilbarco*, 127 F.3d at 1162-63 (citation omitted). Thus, the Ninth Circuit held there was no foreclosure as a matter of law. *Id.* at 1165 (reversing order denying motion for judgment as a matter of law). Similarly here, both forms of alternative channels of distribution are available to Dentsply's rivals. Pet. App. 2a-3a, 31a-37a. In addition, Dentsply's competitors, like Gilbarco's, are free to "compete for the services of the existing distributors." *Gilbarco*, 127 F.3d at 1163. The Third Circuit's refusal to give credence to

these admittedly available distribution channels cannot be reconciled with the decision of the Ninth Circuit and of the other Circuit Courts discussed in the Petition.

Nor is it an answer to assert, as does the Third Circuit (Pet. App. 18a-19a) and the Government (Opp. at 12-14), that the determination of competitive harm in this context turns on the *relative effectiveness* of alternative modes of distribution, rather than on their *availability* to other competitors in the market. But for the decision below, it has been consistently recognized that the existence alone of other means to reach end-users determines anticompetitive effects under the Sherman and Clayton Acts, not a subjective evaluation of whether, having found no market foreclosure, one alternative is more or less effective than another. *E.g., Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1383 (5th Cir. 1994) ("Alternative distributors did not have to be robust to compete; *they merely had to exist.*") (emphasis added). As this Court stated in *Trinko*, "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers." *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-08 (2004) ("Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law . . . .").

That has been the import of other Circuit Courts' answer to the market foreclosure question raised here. As discussed in the Petition at 14-15, if there is no foreclosure, rivals do not have a basis for faulting use by the dominant firm (or any other firm) of exclusive dealerships under some nebulous and wholly subjective claim that the exclusive arrangements are more, or the most, effective channel of distribution available.[4] *See Gilbarco*, 127 F.3d at 1163

[4] In undertaking to measure relative effectiveness in this case, the Third Circuit focused on what it regarded as the greater effectiveness of

("[A]ntitrust laws were not designed to equip [Gilbarco's rivals] with Gilbarco's legitimate competitive advantage.") (citing *Gen. Bus. Sys. v. N. Am. Philips Corp.*, 699 F.2d 965, 979 (9th Cir. 1983) (a defendant having succeeded in legitimately controlling the "'best, most efficient and cheapest source of supply'" does not have to share the fruits of its superior acumen and industry) (citation omitted)).[5]

It might be otherwise if this were an "essential facilities" case, and the Government had been able to establish that Dentsply's tooth dealers were absolutely essential to reaching the relevant end-user tooth market. *E.g., Del. Health Care, Inc. v. MCD Holding Co.*, 957 F. Supp. 535, 546 (D. Del. 1997) (an essential facility is "one which is not merely helpful but vital to [the rival's] competitive

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Dentsply's distribution network. Pet. App. 16a-19a. The trial court, on the other hand, found that the relative ineffectiveness of Dentsply's rivals was due to their own failings in marketing and promoting their tooth products, not to any lack of market access. Pet. App. 138a. Precisely because the effectiveness of distribution can turn, not only on the individual performance of the distributors themselves, but also on how or whether any competitor chooses to utilize the alternatives available, inquiring into the "relative effectiveness" of different distributors, or channels of distribution, sheds little (if any) light on the issue of competitive harm. This essentially is why courts have, instead, relied routinely upon the market foreclosure and the *availability* of alternative outlets to answer that antitrust question. *Gilbarco*, 127 F.3d at 1162-63.

[5] The *Conwood* decision that the Government relies on (Opp. at 13) is entirely inapposite. *Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002). In *Conwood*, plaintiff's claim was "broader than merely challenging the exclusive agreements [defendant] entered into with retailers for exclusive racks," from which the parties agreed the moist snuff product of all competitors are generally sold. *Conwood*, 290 F.3d at 787 n.4. In that case, plaintiff's product had already reached the market. Plaintiff prevailed, not because retailers were unable to obtain its moist snuff product, but largely because it was shown that defendant thereafter "pervasively destroyed [plaintiff's] racks," and "misrepresent[ed] sales activity" of competitive products and "bur[ied] competitors' products" within its own racks. *Id.* No such tortious conduct is involved here.